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5 Attorney for U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF9 MASTER
6 PARTICIPATION TRUST

9 UNITED STATES BANKRUPTCY COURT

10 DISTRICT OF OREGON

11 In re

Case No. 15-32496-pcm13

12 DANIEL ROBERT HOUSE AND
13 PATRICIA ELOISE HOUSE,

Chapter 13

14 Debtors.

OBJECTION TO CONFIRMATION OF
CHAPTER 13 PLAN

CONFIRMATION HEARING:

DATE: July 23, 2015

TIME: 9:00 AM

CTRM: 1

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18 U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust (hereinafter
19 "Creditor"), secured creditor of the above-entitled Debtors, Daniel Robert House and Patricia Eloise
20 House (hereinafter "Debtors"), hereby objects to the Chapter 13 Plan filed by Debtors in the above-
21 referenced matter. Caliber Home Loans, Inc acts as the servicing agent for Creditor. The basis of the
22 objection is stated below:

23 I.

24 **STATEMENT OF FACTS**

25 1. On or about May 24, 2004, Debtors, for valuable consideration, made, executed and
26 delivered to Household Finance Corporation II (hereinafter "Lender") a Promissory Note in the
27 principal sum of \$160,209.36 (the "Note"). Pursuant to the Note, Debtors are obligated to make
28 monthly principal and interest payments.

29 2. On or about May 24, 2004, Debtors made, executed and delivered to Lender a Deed

1 of Trust (the "Deed of Trust") granting Lender a security interest in certain real property located at
2 11138 NE Shaver, Portland, OR 97220 (hereinafter the "Subject Property"), which is more fully
3 described in the Deed of Trust. The Deed of Trust was recorded on May 27, 2004, in the official
4 records of the MULTNOMAH County Recorder's office.

5 3. On or about May 22, 2015, Debtors filed a Chapter 13 bankruptcy petition. Debtors'
6 Chapter 13 Plan provides for payments to the Trustee in the sum of \$250.00 per month for sixty (60)
7 months. However, the Debtor's Chapter 13 Plan makes no provision for the cure of Creditor's pre-
8 petition arrears by regular equal monthly payments. Instead, Debtor provides for the cure of arrears
9 by hypothetical sale or refinance of the property no later than 6/30/2018.

10 4. A debtor who lacks sufficient regular income to fund a Chapter 13 Plan and who
11 proposes, instead, to sell his or her residence using the proceeds of the sale to make a single payment
12 to Creditors, is not eligible for Chapter 13 relief. In re Gavia, 24 B.R. 573 (9th Cir. BAP 1982).

13 5. Creditor is in the process of finalizing its proof of claim for this matter and estimates
14 that its pre-petition arrearage claim is in the approximate amount of \$43,729.29, representing:
15 twenty-six (26) pre-petition payments totaling \$30,417.14; \$12,013.65 in tax advances; \$573.50 in
16 foreclosure fees and costs; \$650.00 in bankruptcy attorneys' fees; and \$75.00 in property inspection
17 fees.

18 6. Debtors will have to increase the payment through the Chapter 13 Plan to this
19 Creditor by approximately \$728.82 monthly in order to cure Creditor's pre-petition arrears over a
20 period not to exceed 60 months.

21 Creditor now objects to the Chapter 13 Plan filed herein by the Debtors.

II.

ARGUMENT

24 Application of the provisions of 11 United States Code sections 1322 and 1325 determines
25 when a plan shall be confirmed by the Court. Based on the above sections, as more fully detailed
26 below, this Plan cannot be confirmed as proposed.

27 | ./. /

28 | //./

1 **A. DEBTOR'S PLAN PROPOSES TO MODIFY CREDITOR'S CLAIM AND**
2 **PROVIDES FOR UNEQUAL PAYMENTS IN VIOLATION OF BANKRUPTCY LAW.**

3 Bankruptcy Code Section 1322(b)(2) provides that the plan may "modify the rights of holders
4 of secured claims, other than a claim secured only by a security interest in real property that is the
5 debtor's principal residence . . ." The issue is whether a plan that proposes the sale or refinance of
6 the residence at an unspecified time within the next 36 months, while withholding payments on
7 arrears during that time, impermissibly modifies the rights of the secured creditor.

8 The Bankruptcy Appellate Panel has addressed this issue in two cases, In re Gavia, 24 BR
9 573 (9th Cir. BAP 1982) and In re Proudfoot, 144 BR 876 (9th Cir. BAP 1992). In both cases, the
10 debtor proposed a Chapter 13 plan calling for a single payment to the secured creditor from the sale
11 of the debtor's residence. The Panel held that, although a "Chapter 13 Plan may modify the rights of
12 a creditor whose only security is the debtor's residence to the extent of curing a default within a
13 reasonable time," withholding current installment payments created rather than cured a default. 24
14 BR at 575; 144 BR at 878. The creation of a default was a modification of the creditor's rights and
15 thus precluded confirmation of the plan in each case.

16 Section 1322(b)(2) precludes confirmation of a plan that modifies the rights of certain
17 creditors. A plan that creates a default modifies the rights of creditors.

18 Recognizing that delay of payments is a modification of the creditor's rights is consistent with
19 the Supreme Court's view of "rights" that cannot be modified under section 1322(b)(2). The Court
20 pointed out that a creditor's rights

21 "are reflected in the relevant mortgage instruments, which are
22 enforceable under [state] law. They include the right to repayment of
23 the principal in monthly payments over a fixed term at specified
24 adjustable rates of interest . . . "

25 Nobleman v. American Savings Bank, 508 US 324, 329 (1993). The Court noted that, although the
26 Bankruptcy Code itself affects the creditor's contractual rights, particularly its power to enforce its
27 rights, the statutory limits are independent of the Chapter 13 plan. 508 US at 330. The law prohibits
28 the plan from affecting the secured creditor's rights, including the right to monthly payments as
provided in the contract.

29 In addition, Section 1325(a)(5)(B)(iii)(I) requires that if payments on this creditor's claim are to be
30 periodic payments, they be in the form of equal monthly amounts. Here, debtor proposes to make

1 one lump sum payment over 3 years from the time of filing the plan from the proceeds of a
2 hypothetical sale or refinance of the property. However, debtor's filings reveal this creditor is not
3 protected by any equity and there is a junior lien against the property. Confirmation of such a plan
4 over creditor's objection would be contrary to the code and would allow debtor to speculate with
5 creditor's money.

6 Because debtor's plan proposes to withhold periodic payments to the mortgage holder and
7 modify the creditor's rights it violates Sections 1325(a)(5) and 1322(b)(2) and cannot be confirmed.

8 **B. DOES NOT MEET FULL VALUE REQUIREMENT**

9 11 U.S.C. § 1325(a)(5)(B)(ii).

10 Amount of Arrearage Not Correct. The pre-petition arrears are not specified in the Chapter
11 13 Plan. The actual pre-petition arrears equal \$43,729.29 based on Creditor's Proof of Claim to be
12 filed prior to the deadline. As a result, the Plan fails to satisfy 11 U.S.C. § 1325(a)(5)(B)(ii).

13 **C. PROMPT CURE OF PRE-PETITION ARREARS**

14 11 U.S.C. § 1322(d).

15 Debtors will have to increase the payment through the Chapter 13 Plan to this Creditor by
16 approximately \$728.82 monthly in order to cure Creditor's pre-petition arrears over a period not to
17 exceed 60 months.

19 WHEREFORE, Creditor respectfully requests:

20 1. That confirmation of the Debtors' Chapter 13 Plan be denied;
21 2. Alternatively, that the Plan be amended to reflect that the pre-petition arrears listed in
22 Creditor's Proof of Claim be paid by equal monthly payments within a period not exceeding 60
23 months; and

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28 3. For such other and further relief as this Court deems just and proper.

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2 Dated: 7/1/15

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4 Respectfully submitted,
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7 ALDRIDGE PITE, LLP
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/s/ Jesse A. P. Baker
JESSE A. P. BAKER, OSB No. 100017
Attorneys for U.S. BANK TRUST, N.A., AS
TRUSTEE FOR LSF9 MASTER PARTICIPATION
TRUST

UNITED STATES BANKRUPTCY COURT

DISTRICT OF OREGON

CASE NO. 15-32496-pcm13

CERTIFICATE OF SERVICE BY MAIL

I, Anne E. Penaloza, am a resident of San Diego, California, and I am over the age of eighteen (18) years, and not a party to the within action. My business address is 4375 Jutland Drive, Suite 200; P.O. Box 17933, San Diego, CA 92177-0933.

I served the attached OBJECTION TO CONFIRMATION OF CHAPTER 13 PLAN by placing a true copy thereof in an envelope addressed to:

SEE ATTACHED SERVICE LIST

11 which envelope was then sealed and postage fully prepaid thereon, and thereafter on July 1, 2015,
12 deposited in the United States Mail at San Diego, California. There is regular delivery service
13 between the place of mailing and the place so addressed by the United States Mail.

14 I certify under penalty of perjury that the foregoing is true and correct.

15 Dated: July 1, 2015 /s/ Anne E. Penalosa
16 ANNE E. PENALOZA

SERVICE LIST

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